No. 19,803

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GOLDEN STATE BOTTLING COMPANY, INC. d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO, RESPONDENT

On Petition for Enforcement of An Order of the National Labor Relations Board

PETITION FOR REHEARING

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

ELLIOTT MOORE,
Attorney,

National Labor Relations Board.

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1. In its decision of December 2, 1965, a division of the Court (Circuit Judges Chambers and Koelsch, and District Judge Thompson) sustained the Board's findings that respondent unlawfully discharged employee Baker, and unlawfully dominated the administration of the Independent Union (P.C.B.C.E.). The Court, however, set aside the Board's finding that respondent had violated the Act by locking out its employees in order to force them to accept its contract

terms, holding that such action was privileged under the intervening decision of the Supreme Court in *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300. The Court also declined to enforce that portion of the Board's order (paragraph 1(d)) which bars respondent from giving effect to the contract with P.C.B.C.E., dated April 1, 1963.

2. The Court's action in setting aside the lockout finding is contrary to the action of another division of the Court (Circuit Judges Barnes and Hamley, and Senior District Judge Mathes) in *N.L.R.B.* v. *Tonkin Corporation of California*, No. 19714, decided November 10, 1965.[1] In that case, the facts of which are closely related to those here, the Court remanded the question of the legality of the lockout to the Board for further consideration in the light of *American Ship, supra.* We submit that this was the correct procedure, and that the same procedure should have been followed here.

Thus, *American Ship* merely holds that an employer may lawfully use a lockout, after an impasse in negotiations, to advance a legitimate bargaining position; it does not sanction the use of a lockout to further a course of illegal activity. Accordingly, even under *American Ship*, the lockout here would still be illegal if it were found that it was merely a means of implementing respondent's illegal efforts to dominate the administration of the Union. In its prior decision, rendered before *American Ship*, the Board did not

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[1] The respondent employer has filed a petition for rehearing in that case.

deem it necessary to make a finding as to the purpose of the lockout. Since *American Ship* has now made such a finding relevant, this Court—instead of assuming, as it did, that the lockout was divorced from respondent's other illegal activity—should have remanded the case to the Board so that it could determine, subject to later review by the Court, whether the record would warrant a finding that the lockout was illegally motivated.[2] As noted, this was the course followed in *Tonkin*, and such procedure was equally appropriate here.

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[2] The record here shows that, *immediately* after announcing that the employees could not work without a contract, Schilling used the resultant confusion as occasion for an unlawful assault on the Union's integrity. The record also includes evidence that, prior to the lockout, Schilling told employees, in effect, that the Independent Union's bargaining committee was trying to "disrupt" the Company's operation by seeking a better contract and that the committeemen should find other jobs (R. 12; Tr. 17-18, 20-21, 162-167), and also directed the Union's secretary to take proxies from employees who did not intend to vote at the meeting called to consider the Company's contract offer (Tr. 116-117). We submit that on this evidence it is arguable that the lockout itself was part of a plan to "injure" the Union by interfering with its administration. Moreover, as this Court found (slip op., pp. 3, 4), Baker's subsequent discharge "was motivated by his past union activities on behalf of the Teamsters [the "March and April incidents"]" and this anti-Teamster motivation was directly related to the lockout by Schilling's contemporaneous remark that the Teamsters Union was "trying to get in" but "will never make it now (R. 13; Tr. 29). This would lend further support to the argument that Schilling's motivation in announcing that the employees could not work without a contract was unlawful.

3. The portion of the Board's order dealing with the contract between the Company and the Independent Union (Paragraph 1(d)) is intended to permit the Company to maintain working conditions now in effect while prohibiting it from treating them as contractually imposed. The purpose of this provision, which was not challenged by the Company (*Marshall Field & Co.* v. *N.L.R.B.*, 318 U.S. 253), is to effectuate the withdrawal of recognition from the Independent Union, for an appropriate time, without compelling the Company to withdraw benefits in the name of compliance with the Board's order. See, *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350, 365; *J. I. Case* v. *N.L.R.B.*, 321 U.S. 332, 340-342; *I.L.G.W.U.* v. *N.L.R.B.*, 366 U.S. 731, 735, n. 7; *N.L.R.B.* v. *Wemyss*, 212 F. 2d 465, 472, 473-474 (C.A. 9); *Independent Stave Co., Inc.* v. *N.L.R.B.*, F. 2d (C.A. 8), November 10, 1965, 60 LRRM 2406, 2413, 52 L.C. Para. 16, 729. If, as the Court found (slip op., p. 6), paragraph 1(d) of the Board's order is ambiguous, we submit that the Court should have remanded that portion of the order to the Board for clarification, instead of denying enforcement and thereby permitting respondent to continue to maintain a contract which the Court found was obtained through unlawful means.

4. For these reasons, we submit that this Petition for Rehearing should be granted, and that the instant case should be remanded to the Board on the lockout and the contract issues noted above. Since the treatment of the lockout issue here is inconsistent with the

action of another division of the Court in *Tonkin*, it may be appropriate to have the matter considered by the Court *en banc*.

Respectfully submitted,

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D.C.
this 21st day of December, 1965

CERTIFICATE OF COUNSEL

MARCEL MALLET-PREVOST, Assistant General Counsel of the National Labor Relations Board, certifies that he has read and knows the contents of the foregoing petition and that said petition is presented in good faith and not for purposes of delay.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

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